

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
DIRECTOR'S OFFICE

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January 26, 2010

The Honorable Gary Stevens
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, Alaska 99801

The Honorable Mike Chenault
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, Alaska 99801

Dear President Stevens and Speaker Chenault:

This letter serves as the Department of Environmental Conservation's (DEC) fifth annual report to the legislature on efforts to obtain and implement state primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge program. This report highlights our first year efforts since the Environmental Protection Agency (EPA) approved the state's program on October 31, 2008 – the Alaska Pollutant Discharge Elimination System (APDES) program. This report provides background information; a description of the program responsibilities transferred to the Department; permitting, compliance, and enforcement activities during the previous year; and an update on the notice of a petition filed with the U.S. Ninth Circuit Court challenging EPA's approval of the program.

Background

The 24th Alaska Legislature passed Senate Bill 110 during its 1st regular session in 2005 directing DEC to seek primacy from the EPA for the NPDES wastewater discharge program. Governor Murkowski signed this legislation into law on August 27, 2005 with an effective date of November 25, 2005. Section 6 of the bill reads as follows:

REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:

(1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;

(2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and

(3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National Pollutant Discharge Elimination System program transition period, the identification of the program responsibilities that have been transferred to the Department of Environmental Conservation and the program responsibilities retained by the United States Environmental Protection Agency, whether the transition is proceeding on schedule, and identification of relevant statutory, regulatory, or financial impediments to obtaining National Pollutant Discharge Elimination System primacy as intended by the Legislature.

Work Group Involvement

As required by Section 5 of SB 110, DEC will continue to confer as needed with the NPDES Primacy Work Group, which includes representatives of affected permittees. The Work Group was not convened in 2009.

The Work Group's members are listed at the DEC website at: http://www.dec.state.ak.us/water/npdes/work_group.htm, along with the 2005 Work Group Report.

Statutory, Regulatory, and Financial Issues

No statutory, regulatory, or financial impediments to implement the program exist; however, DEC will occasionally need to make revisions in response to changes to the federal program to keep Alaska's program current.

Transfer of Authority

EPA's October 2008 approval of the state's APDES program includes transfer of permitting, compliance, and enforcement for specific dischargers in phases over a three-year period, rather than the five-year period envisioned in SB 110. The schedule to transfer authority is:

Phase I: At program approval - October 31, 2008

Domestic discharges, seafood industry, and timber handling

Phase II: One year from program approval - October 31, 2009

Storm Water Program, Pretreatment Program, and miscellaneous industrial discharges

Phase III: Two years from program approval - October 31, 2010

Mining industry

Phase IV: Three years from program approval - October 31, 2011

Oil and gas industry and cooling water intakes and discharges

As of October 31, 2009, DEC has assumed permitting, compliance, and enforcement authority for facilities in Phases I and II. EPA retains authority for a facility until the facility transfers to the state in accordance with the transfer schedule. DEC will have full authority to implement the APDES program for all permittees on October 31, 2011.

EPA has no authority to issue a permit to a facility where jurisdiction over that facility has transferred to the state; however, pursuant to the Clean Water Act, EPA retains authority to review all DEC-drafted permits and to conduct inspections and pursue an enforcement action on any discharger in Alaska.

Phase I Program Implementation

Prior to EPA approval of the APDES program and the start of Phase I, DEC worked closely with EPA through a work share agreement to reissue the two Log Transfer Facility general permits. DEC staff drafted the permit and supporting documents, and EPA conducted the public notice process and issued the permits immediately prior to the start of Phase I. Upon authority over the Log Transfer Facility general permits transferring to DEC, staff issued 83 authorizations to facilities to discharge under the permits.

Many of the permits in Phase I are not current and were not reissued by EPA before authority over the permits transferred to DEC. Although EPA approved the APDES program on October 31, 2008, DEC did not receive Phase I facility files from EPA until February 2009. Some files were found to be lacking background data and other necessary documentation requiring DEC to request additional information from EPA and the facilities. DEC immediately began working on the files and developing draft permits and supporting documents.

The APDES program is developing successfully. DEC continues to fine tune permitting checklists and templates to streamline the permit issuance process; draft permits are posted on DEC's web page; and Tribes, the public, and EPA are notified when a permit is available for review, encouraging early input and fostering transparency in permitting decisions. Finally, all required APDES data are reported to EPA's national database, and DEC's web pages continue to be updated to better serve permittees and the public.

Phase II - Program Implementation

DEC was well prepared for the October 31, 2009 transfer of Phase II, specifically implementation of the Storm Water and Pretreatment Programs. Early coordination with EPA resulted in timely receipt of Phase II facility files. The storm water permit applications are available on the DEC web site for electronic filing. Early feedback from permittees indicates that the DEC online permit application system is preferable to EPA's system. Pretreatment Program forms and checklists are being developed; 15 pretreatment industrial surveys were conducted in several Southcentral communities; and pretreatment program training is scheduled for DEC staff in the spring 2010.

Permitting Activities

DEC developed a three-year Permit Issuance Plan that identifies the schedule of permits proposed to be issued. The updated plan will be available for review soon on DEC's web page: <http://dec.alaska.gov/water/wwdp/index.htm>.

In 2009, DEC issued a total of 145 authorizations. Of that total, 137 were authorizations under general permits, four were DEC Clean Water Act section 401 certifications of EPA-issued NPDES permits, one was an APDES general permit, and three were APDES individual permits. Significant permit development work has been underway during this first year, and DEC's rate of permit issuance will increase now that the first year's efforts are resulting in a number of permits approaching issuance. Sixteen APDES permits are either under development or undergoing internal review prior to public notice, two are undergoing public review, and two have completed the public notice and review process and will be issued soon.

Although the number of permits issued during the first year of primacy was less than originally expected, this first year's effort by DEC is consistent with EPA's recent average of issuing about six permits per year in Alaska. As DEC gains experience, we expect to greatly improve on that average.

Compliance and Enforcement Activities

DEC conducted 123 inspections from November 1, 2008 through December 31, 2009. Facilities inspected included municipal domestic wastewater treatment plants, seafood processors, and construction sites. Staff also accompanied EPA personnel on eight joint inspections. DEC completed an inspection report and provided a response to the permittee within 44 days on average, more timely than EPA has traditionally done.

Based on the inspections, 11 Notices of Violations were issued and follow up enforcement actions, where appropriate, are pending.

Program Capacity Development

DEC continued to implement several components of its capacity building plan to ensure adequate staffing and training to implement the APDES program. An updated summary of those efforts will be available on the DEC web page in February. DEC continues to experience recruiting difficulties and is actively recruiting four vacant positions in the APDES program: the permit program manager, a permitting section manager, an inspector, and a permit writer. In addition to taking over the permitting and compliance authority over the dischargers in Phases I and II, staff will continue to receive classroom training and conduct joint inspections with EPA for Phases III and IV facilities during the coming year and will begin this year to write Phase III permits for issuance after authority for Phase III facilities transfers to DEC on October 31, 2010.

Petition to the U.S. Ninth Circuit Court

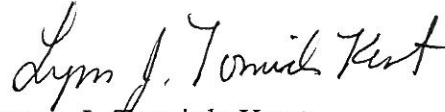
On November 28, 2008, a petition (*Akiak et al v. US EPA*) challenging EPA's approval of Alaska's NPDES primacy application was filed with the U.S. Ninth Circuit Court. The petitioners include several Tribal councils, Cook Inlet Keeper, Alaska Center for the Environment, Alaska Community Action on Toxics, The Center for Biological Diversity, and The Center for Water Advocacy. The petitioners claim that the state's program does not comply with 40 CFR §123.30 (judicial review of permits), because the state's 'loser pays' rule will deter potential litigants from challenging a permit decision in court. The petitioner also challenges the program based on the absence of administrative penalty authority and the loss of tribal consultation. DEC has filed to intervene in the case in support of EPA's decision and will closely track the petition as it progresses through the court system. Briefing is now complete, and we are awaiting orders from the Court regarding oral argument. Filing of the petition does not affect DEC's authority to administer the APDES program in the meantime.

The Honorable Gary Stevens
The Honorable Mike Chenault

January 26, 2010

DEC looks forward to continuing to implement the APDES program in Alaska to ensure protection of our valuable water resources through issuance of current, protective discharge permits, a robust inspection program, and timely and predictable enforcement actions to ensure compliance. We are prepared to answer any questions you may have about the APDES program.

Sincerely,

A handwritten signature in black ink, reading "Lynn J. Tomich Kent". The signature is written in a cursive, flowing style.

Lynn J. Tomich Kent
Director

cc: Randy Ruaro, Deputy Chief of Staff, Office of the Governor
Jerry Gallagher, Legislative Director, Office of the Governor
Cora Crome, Special Assistant, Office of the Governor
Kirsten Waid, Senate Secretary, Alaska State Legislature
Suzi Lowell, House Chief Clerk, Alaska State Legislature